

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

J. MITCH HALL and NATHAN
KAY,

Plaintiffs,

v.

L-3 COMMUNICATIONS
CORPORATION, L-3
COMMUNICATIONS VERTEX
AEROSPACE, LLC and L-3
COMMUNICATIONS
INTEGRATED SYSTEMS L.P.,

Defendants.

NO. 2:15-cv-231-SAB

PLAINTIFFS' CONSOLIDATED
RESPONSE TO DEFENDANTS'
MOTIONS FOR PROTECTIVE
ORDERS

09/22/2016

With Oral Argument: 10:30 AM

I. Introduction

Plaintiffs, Mitch Hall and Nathan Kay respond to Defendants' motions (Dkt. Nos. 62, 63, 64, and 81¹) for protective orders. This Court should deny the motions, disregard the inflammatory allegations made therein, overrule the pertinent discovery objections therein, and order Defendants to produce the discovery requested by the Plaintiffs.

This response is supported by the accompanying declaration of counsel, and records on the docket.

¹ Defendants' fourth motion (Dkt. 81) is recycled version of the prior three motions, matters that are addressed herein.

II. Argument

A. L-3s' Motion to Stay Discovery Dkt. No. 62 should be denied.

Defendants' "motion for a protective order" falls well short of the legal standard required of parties seeking such an order. It is instead, a disguised motion for a stay of discovery, since no provision of the Federal Rules of Civil Procedure prevents discovery from continuing to move forward. Motions for stays of discovery are disfavored; even a filed motion to dismiss does not establish grounds for staying discovery. See *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D.Cal.1990); *Old Republic Title, Ltd. v. Kelley*, C10-0038JLR, 2010 WL 4053371 (W.D. Wash. Oct. 13, 2010). L-3 has failed to support their motion with the facts and law required to grant such a prohibitive and disfavored order.

Federal Rule of Civil Procedure 26(c) governs the granting of a protective order. A protective order should be granted only when the moving party establishes "good cause" for the order, and "justice requires [a protective order] to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense [...]." FRCP 26(c). Conversely, "A party seeking a stay of discovery carries a heavy burden of making a 'strong showing' why discovery should be denied.

1 *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir.1975). The
2 moving party must show a particular and specific need for the protective
3 order, as opposed to making stereotyped or conclusory statements. *Gray*,
4 133 F.R.D. at 40; *Skellerup Indus. Ltd. v. City of Los Angeles*, 163 F.R.D.
5 598, 600 (C.D. Cal. 1995).
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7 **1. L-3 has failed to meet its heavy burden.**

8 L-3 provides only a conclusory rational for the exceptional relief they
9 seek: (a) Plaintiffs have no evidence to support their claims against its
10 Corporate Parent; (b) all discovery that L-3/CC refused to respond to is
11 irrelevant; and (c) that further discovery should be stayed until after a
12 related summary judgment is determined. In other words, L-3 should be
13 allowed to stay all discovery and argue for summary judgement without
14 ever answering any of plaintiffs' discovery requests. See Dkt. No. 62 at
15 6-8. Defendants apparently also believe that rather than answering
16 discovery, Mr. Hall should already know which L-3/CC personnel
17 adversely impacted his employment. *Id.* at 7:18.
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21 First, speculation that L-3 might succeed in their summary judgment
22 is not grounds, under any authority, for issuing an order blocking
23 discovery. Second, this is the very type of conclusory rationale for a
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1 discovery stay that courts routinely reject. Third, the pending unresolved
2 discovery is directly relevant to the issues brought in L-3s' motion for
3 summary judgment.

4 L-3 has not made a "strong showing." In fact, L-3 has failed to show
5 they will suffer any harm or prejudice if they are required to participate in
6 the discovery process dictated by the Federal Rules of Civil Procedure.
7 Dkt. No 62. Rather, Defendants merely demand a stay of Plaintiffs'
8 discovery requests pending the Court's ruling on a potential motion to
9 dismiss one Defendant. Critically, L-3 has failed to provide any reason
10 why they should not be subject to the rule against blanket discovery
11 stays. Defendants have done nothing more than predict, in conclusory
12 fashion, that their motion for summary judgment will succeed (if plaintiffs
13 are improperly denied further discovery on issues relevant to the motion).
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17 The intention of a party to move for summary judgment is not
18 sufficient to justify a stay of discovery. See *e.g. Gray*, 133 F.R.D. at 40.
19 Had the Federal Rules contemplated that such a motion should be used
20 as a basis to stay discovery, the rules would have made it clear. *Id.* As
21 the *Gray* court observed:
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23 In fact, such a notion is directly at odds with the need for
24 expeditious resolution of litigation. Under Rule 33, for instance,

1 interrogatories may be served at the same time as the
2 summons and complaint. Since motions to dismiss are a
3 frequent part of federal practice, this provision only makes
4 sense if discovery is not to be stayed pending resolution of
5 such motions.

6 Furthermore, a stay of the type requested by defendants, where
7 a party asserts that dismissal is likely, would require the court to
8 make a preliminary finding of the likelihood of success on the
9 motion to dismiss. This would circumvent the procedures for
10 resolution of such a motion. *Id.*

11 Indeed, “[a] stay of discovery pending determination of a motion to
12 dismiss is rarely appropriate when the pending motion will not dispose of
13 the entire case.” *Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance*
14 *Auth.*, 201 F.R.D. 1, 3 (D.D.C.2001) (citation and internal quotation marks
15 omitted). L-3s’ motion will not dispose of this case. Either L-3/CC will
16 prevail on their motion, and be subject to third-party discovery; or Plaintiffs
17 will prevail, and L-3/CC will be subject to first-party discovery. Either way,
18 Defendants will be subject to discovery.

19 **2. Plaintiffs’ discovery is relevant.**

20 L-3/CC’s Motion for a Protective Order (Dkt. 62) should be denied
21 because the information sought from L-3 is relevant to the issue of
22 whether L-3/CC is a joint employer for the purposes of USERRA. The
23 Motion for a Protective Order is further predicated on the assumption that
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1 L-3/CC is not a "joint employer" of the plaintiffs in this action along with L-
2 3/CIS and/or-3/vertex. Plaintiffs are entitled to discovery on that issue and
3 plaintiff's discovery to L-3/CC seeks that information.

4 As a starting point USERRA provides that an employee can be
5 employed in one job by more than one employer. 20 C.F.R. §1002.37. A
6 joint employment relationship may exist if the parent corporation (here L-
7 3/CC) delegates performance of employment related responsibilities or
8 was a successor in interest to the entity that had control over Plaintiff's
9 employment responsibilities. To that end, plaintiff sought discovery from
10 L-3 seeking information relevant and proportional to the issue of joint
11 employment.

12 For example, Plaintiffs' discovery to L-3/CC seeks identities of
13 individuals with military reserve affiliation who applied for employment as
14 pilots with L-3/CC from January 1, 2011 to the present day and whether
15 said individuals were hired by L-3/CC. (Dkt. No. 68-1, p. 19 *citing* PLF
16 Rog. 3). When discovery shows that L-3/CC, *i.e.* the "parent corporation"
17 rejected a disproportionate amount of military reserve pilot applicants and
18 L-3/CC's "children" also rejected a disproportionate amount of military
19 reserve pilot applications discrimination may be inferred; that the "children"
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1 are following the example of their “parent” in discriminating against reserve
2 pilots in the hiring process. Tellingly, L-3/CC’s outright refusal to produce
3 the documents relating to or associated with the process by which it hires
4 individuals into pilot positions. *Id.* at 19-20 (*citing* PLF RFP 3).

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6 L-3/CC also refuses to state the name of the individual who was in
7 charge of hiring pilots for L-3/CC during the 2014 to 2015 timeframe,
8 refuses to identify who it interviewed regarding Plaintiffs’ claims and
9 Defendants’ defenses, and refuses to identify its constituents. *Id.* at 20-21,
10 28 (*citing* PLF Rog. 4, 5). L-3/CC’s answers to these questions would
11 reveal a common core of natural person decision makers the “parent” and
12 “children” corporations relied upon in making the hiring and re-employment
13 decisions that are subject to this lawsuit which goes directly to the issue of
14 whether L-3/CC, L-3/VERTEX, and L-3/CIS are joint employers. 20 C.F.R.
15 § 1002.37; 38 U.S.C. § 4303(4).
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18 L-3/CC refuses to produce the required posters it maintains in the
19 workplace regarding the prevention of discrimination. *Id.* at 24 (*citing* PLF
20 RFP 11). L-3/CC refuses to produce any complaints it has received
21 relating to military discrimination. *Id.* at 26 (*citing* PLF RFP 14). L-3/CC’s
22 answers to those questions bear upon whether it even follows Congress’s
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1 command that employers maintain the required USERRA rights poster. 38
2 U.S.C. § 4334. If L-3/CC fails to heed the Congressional requirement to
3 maintain the USERRA rights poster, then this is circumstantial evidence of
4 discrimination that could be imputed to its “children”. More importantly,
5 discovery of military-related discrimination complaints L-3/CC received will
6 go to the issue of what, if anything, L-3/CC did to resolve those complaints
7 and whether L-3/CC, as the “parent” made sure its “children” were taking
8 care to ensure laws relating to the employment/re-employment of veterans
9 were being followed.
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12 L-3/CC refuses to list pilot openings that existed during the
13 timeframe Mr. Hall sought re-employment. *Id.* at 31-32 (*citing* PLF Rog. 10
14 & RFP 17). If pilot openings existed for which Mr. Hall was qualified then
15 that bears on both Mr. Hall’s USERRA failure to re-employ claim and L-
16 3/CC’s affirmative defense (as well as the affirmative defenses of L-3/CC’s
17 “children”) as to whether re-employment of Mr. Hall was “impossible or
18 unreasonable.” (Dkt. No. 53, pg. 16, ¶72) USERRA “[s]ection 4313
19 provides for the order in which a person entitled to reemployment under §
20 4312 must be reemployed.” *Munoz v. InGenesis STGI Partners, LLC*, __
21 F.Supp.3d __, 2016 WL 1620367, at *11 (S.D. Cal. Apr. 22, 2016). That
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1 order of priority includes (1) the position Mr. Hall occupied before going on
2 military leave (the "escalator position"), (2) the alternative escalator
3 position, or (3) the nearest approximate position. 38 U.S.C. §
4 4313(a)(1)&(4). If L-3/CC had an alternate escalator position or an
5 approximate position then the availability of such positions would call its
6 childrens' impossibility/unreasonable affirmative defenses into question as
7 well as its own. (Dkt. No. 54, p. 17, ¶86; Dkt. No. 55, p. 17, ¶85)

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9 **B. Defendants' Protective Order No. 63, based on "Classified**
10 **Information" should be denied.**

11 Litigants "may obtain discovery regarding any matter, not privileged,
12 that is relevant to the claim or defense of any party." *Survivor Media, Inc.*
13 *v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir. 2005). "Relevant
14 information for purposes of discovery is information reasonably calculated
15 to lead to the discovery of admissible evidence." *Id.* "A request for
16 discovery should be considered relevant if there is any possibility that the
17 information sought may be relevant to the subject matter of this action.
18 Discovery should ordinarily be allowed under the concept of relevancy
19 unless it is clear that the information sought can have no possible bearing
20 upon the subject matter of this action." *Ragge v. MCA/Universal Studios,*
21 *Inc.*, 165 F.R.D. 601, 604 (C.D. Cal. 1995). District courts have broad

1 discretion in determining relevancy for discovery purposes. *Hallett v.*
2 *Morgan*, 296 F.3d 732, 751 (9th Cir. 2002).

3 As the party seeking to avoid discovery, L-3 “bears the burden of
4 making the showing of good cause contemplated by [Rule 26].” *Alexander*
5 *v. FBI*, 186 F.R.D. 71, 76 (D.D.C. 1998). This requires “a specific
6 demonstration of facts in support of the request as opposed to conclusory
7 or speculative statements about the need for a protective order and the
8 harm which will be suffered without one.” *Id.* This burden is a heavy one in
9 employment discrimination lawsuits, where discovery rules are construed
10 liberally so as to provide the plaintiff with “broad access to the employers’
11 records.” *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 643, 109
12 S. Ct. 2115, 104 L. Ed. 2d 733 (1989). “A mere showing that discovery
13 may involve inconvenience and expense will not meet this threshold
14 requirement.” *Univ. of Mass. v. Roslin Inst.*, 437 F. Supp. 2d 57, 60-61
15 (D.D.C. 2006) (internal citations omitted). Defendants’ motion “Regarding
16 Classified Information” should be denied because it fails under these
17 standards.
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22 Defendants seek to prevent discovery regarding Interrogatory No. 8,
23 RFP Nos. 15 and 18 which request copies of federal contracts held by L-3.
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1 Dkt. 68-1 at 26, 28, 32. Defendants attempt to support their motion
2 alleging that: (a) that these records are not relevant to the litigation; (b) the
3 records are too voluminous; and (c) the records may contain classified
4 information that may not be released by defendants. Dkt. No. 63 at 9-10.
5 None of these arguments has any merit, nor serve as a basis for a
6 protective order.
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8 **1. Plaintiffs' discovery is relevant.**

9 First, the contracts, whether they contain classified information, or
10 not, are absolutely relevant to this matter for demonstrating inconsistency
11 with L-3s' own requirements. The standard of relevance in discovery is
12 "minimal." See *Cobell v. Norton*, 226 F.R.D. 67, 94 (D.D.C. 2005).
13 "Evidence is relevant if (a) it has any tendency to make a fact more or
14 less probable than it would be without the evidence; and (b) the fact is of
15 consequence in determining the action." Fed. R. Evid. 401.
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18 The requests that L-3 challenges seek the very records which the
19 Defendants, themselves, placed directly at issue in its defense of this
20 lawsuit. Defendants acknowledge this to the court on May 31, 2016,
21 when their attorney, Mr. Hineline told the court during the scheduling
22 conference that Defendants had "secret contracts" that he had concerns
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1 with regarding discovery. Dkt. No. 63 at 6. Both of Plaintiffs' counsel
2 immediately followed up with Mr. Hineline that day to structure an
3 approach to the issue, to no avail. Jarrard Decl. at ¶ 15-25. Mr. Hineline
4 refused to respond to multiple follow-up emails and would not engage in
5 any collaborative effort to resolve the alleged issue. *Id.* In responding to
6 discovery, L-3 objected to the requests and produced nothing. Dkt. 68-1
7 at 26, 28, 32. Later, during the resulting meet-and-confer process,
8 Hineline admitted that certain contracts did not contain secret information
9 and that seven (7) contracts for the programs in which Mr. Hall worked, or
10 that Mr. Kay applied to, were relevant to the matter, but may contain
11 classified information. Jarrard Decl. at 17: 7.² In any event, Defense
12 counsel could not know this for certain, however, because he had not
13 seen the contracts. *Id.* Defendants refused to produce a single contract.
14 In its briefing (but not in discovery), Defendants further admit they are
15 required to follow the minimal federal requirements imposed on Federal
16 Contractors under 38 U.S.C. § 4212. Dkt. 63 at 5.

17 Second L-3's complaint, that there is no individual right of action
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23 ² Hineline alleges these efforts constitute abrasive discovery tactics, or that Plaintiff's
24 counsel demanded Defendants break the law. Dkt. 68. These absurd allegations are
25 belied by the fact the Mr. Jarrard has directed Defendants' counsel to the proper
procedures throughout this litigation. See Jarrard Decl. ¶¶ 15 and 22; Dkt. 70 at 5n2.

1 under the VEVRAA is a strawman argument. L-3s' federal contracts and
2 attendant requirements are relevant to Mr. Hall's and Mr. Kay's USERRA
3 discrimination claims because they will show inconsistencies with L-3's
4 own requirements. Section 4311 of the USERRA specifically prohibits
5 employers from discriminating against employees on the basis of military
6 service. In USERRA cases, the "factual question of discriminatory
7 motivation or intent may be proven by either direct or circumstantial
8 evidence." *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir.
9 2001). Discriminatory motivation under the USERRA may be "reasonably
10 inferred from a variety of factors" such as "inconsistencies between the
11 proffered reason and other actions of the employer" and "hostility towards
12 members protected by the statute together with knowledge of the
13 employee's military activity." *Id.* In determining whether the employee
14 has proven that his protected status was part of the motivation for the
15 agency's conduct, all record evidence may be considered, including the
16 agency's explanation for the actions taken. *Id.*

17 Likewise, section 4212 of the Vietnam Era Veterans' Readjustment
18 Assistance Act of 1974 (VEVRAA), 38 U.S.C. § 4212, is the immediate
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predecessor of USERRA³ and it also protects returning service members from discrimination and specifically requires an employer to take affirmative action to employ and advance qualified covered veterans. 41 C.F.R. § 60-300.5(a). As recently separated veterans, and military reservists, both Mr. Kay and Mr. Hall are protected under the VEVRAA. 38 U.S.C. § 4212(a)(3)(A); 41 C.F.R. § 60-300.2(q) and USERRA 38 U.S.C. § 4311. They occupy the same protected status under both statutory schemes. Mr. Hall and Kay are entitled to those records to demonstrate L-3s' actions in this case are inconsistent with its own federal contract requirements.

2. Plaintiffs' discovery is relevant to proving pretext.

Further, Mr. Hall's and Mr. Kay's complaint alleges pretext, (Dkt. 14 at ¶ 2.87) which all Defendants deny (Dkt. Nos. 48 at ¶ 59, 49 at ¶ 72 and 50 at ¶74. Accordingly, Plaintiffs are entitled to gather evidence, including their federal contracts, which demonstrate that the reasons for defendants' adverse actions, as given by L-3, are a pretext. See

³ "USERRA's predecessor was the Vietnam Era Veterans' Readjustment Allowance Act of 1974 ("VEVRAA"), which was defined by the Supreme Court as to be "enacted for the significant but limited purpose of protecting the employee-reservist against discrimination like discharge and demotion, motivated solely by reserve status." *Hance v. Norfolk S. Ry. Co.*, 2006 U.S. Dist. LEXIS 32276 (E.D. Tenn. May 17, 2006) (citing *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559, 101 S.Ct. 2510 (1981)).

1 *Velazquez-Garcia v. Horizon Lines of P.R., Inc.*, 473 F.3d 11, 17 (1st Cir.
2 P.R. 2007)(“employer must show, by a preponderance of the evidence,
3 that the stated reason was not a pretext; that is, that “the action would
4 have been taken in the absence of [the employee's military] service.” 38
5 U.S.C. § 4311(c)”); *c.f. Zhu v. N. Cent. Educ. Serv. Dist.-ESD 171*, No.
6 2:15-CV-00183-JLQ, 2016 WL 4445758, at 12 (E.D. Wash. Aug. 22,
7 2016)(holding the failure to follow 41 C.F.R. § 60 and failure to report
8 Plaintiff's complaints raises a question of fact as to whether ESD 171's
9 reasons were pretext.) “In other words, a defendant must prove the
10 nonpretextual, permissible reason for termination notwithstanding
11 uniformed service as an affirmative defense.” *Wagner v. Novartis*
12 *Pharms. Corp.*, 565 F. Supp. 2d 940, 947 (E.D. Tenn. 2008)(citations
13 omitted). Pretext can be proven indirectly, by showing the employer's
14 explanation is not credible because it is internally inconsistent or
15 otherwise not believable, or directly, by showing unlawful discrimination
16 more likely motivated the employer. *Kelleher v. Fred Meyer Stores Inc.*,
17 302 F.R.D. 596, 598 (E.D. Wash. 2014). In *Wagner*, the court held that
18 evidence that employer failed to follow its own policies and procedure was
19 circumstantial evidence of discrimination. *Wagner v. Novartis Pharms.*
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1 *Corp.*, 565 F. Supp. 2d at 947. Here, the contractual VEVRAA
2 requirements that apply to Mr. Hall and Mr. Kay are evidence the
3 explanations proffered by L-3 are both inconsistent with their own
4 requirements and unworthy of credence.

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6 Finally, Defendant tacitly admit that these federal contracting
7 requirements are relevant to this case, but refuse to produce the contracts
8 that contain them. Dkt. 63 at 5-6, (noting the agreement to stipulate to
9 some of the pertinent requirements, but refusing to produce the records.).
10 Contrary to Defendants' claims, a stipulation regarding the requirements
11 is not sufficient for discovery. The actual records are needed for
12 examination. In particular, when we are dealing with several different
13 contracts in different programs, an examination of each contract and its
14 requirements is therefore needed to determine whether there is
15 circumstantial evidence of discrimination against Mr. Kay and Mr. Hall. .
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18 **3. L-3 does not have standing to assert a back-door State's**
19 **Secret Privilege.**

20 Defendants allege they may not produce discovery because, "by law,
21 L-3 cannot turn over many [tellingly, not all] contracts including those for
22 the pertinent S4, JM and MARSS programs, without prior authorization
23 from the government." Dkt. No 63 at 10. In other words, L-3 (a private

1 corporation) seeks to assert the State's Secret Privilege. Their motion
2 should be denied.

3 First, "The privilege belongs to the Government and must be
4 asserted by it; it can neither be claimed nor waived by a private party.
5 *United States v. Reynolds*, 345 U.S. 1, 7-8 (U.S. 1953). As discussed by
6 the *Reynolds* court:
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8 It is not to be lightly invoked. There must be a formal claim of
9 privilege, lodged by the head of the department which has
10 control over the matter, after actual personal consideration by
11 that officer. *Id.*

12 There is no formal claim of privilege in this case by the U.S. and L-3,
13 as a private party, may not assert the privilege. *Id.* Defendants know this
14 because they were told as much, with citation to authority, on numerous
15 occasions. Accordingly, they have adopted a back-door approach to the
16 matter to avoid the required steps of giving notice to the U.S. and
17 participating in this court's review of the records. *See Infra.*

18 Second, Defendants have failed to follow any of the required steps
19 that would allow them to withhold the alleged classified contracts. "When
20 considering a motion to withhold classified information from discovery, a
21 district court must first determine whether, pursuant to the Federal Rules
22 of Criminal Procedure, statute, or the common law, the information at
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1 issue is discoverable at all. *United States v. Sedaghaty*, 728 F.3d 885,
2 904 (9th Cir. Or. 2013). "If the material at issue is discoverable, the court
3 must next determine whether the government has made a formal claim of
4 the state secrets privilege, "lodged by the head of the department which
5 has actual control over the matter, after actual personal consideration by
6 that officer." *Id.* (citation omitted.) In addition, "[t]he asserting party, as in
7 any case where a privilege is claimed, must sufficiently identify the
8 documents so as to afford the requesting party an opportunity to challenge
9 the assertion of privilege." *Thomas v. Guffey*, 2015 U.S. Dist. LEXIS
10 31381, 5-7 (E.D. Cal. Mar. 13, 2015) *citing* *Miller v. Pancucci*, 141 F.R.D.
11 292, 300 (C.D. Cal. 1992).

12 L-3 has failed to follow any of these steps. L-3 has failed to inform
13 the U.S. of this matter and has not identified any of the alleged 7000
14 contracts it states it is withholding. Dkt. 68-1 at 26, 28, 32.

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18 **4. L-3 exaggerates what contracts are responsive to Plaintiff's**
19 **discovery requests.**

20 L-3 also argues that is has over 7000 contracts that are responsive
21 to Plaintiffs' discovery request, therefore, Plaintiff's requests are too
22 burdensome. Indeed, this conclusory statement is exaggerated. As
23 noted above, L-3 admitted that at least 7 of those contracts are relevant
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1 and related to the Plaintiffs' claims, but Defendant still refuse to produce
2 even those records. Further, those few contracts have been repeatedly
3 requested by plaintiffs' counsel, to no avail. Jarrard Decl. at 17: 13-25.

4 **C. Defendants' Protective Order No. 64 regarding names of**
5 **applicants and pilots, employment and hiring policies, and**
6 **attorney client privilege and work product should be denied.**

7 Defendants object to providing Plaintiffs the identities of fellow
8 applicants and pilots because (a) Plaintiffs do not have a need to know; (b)
9 there are exaggerated concerns for safety; and (c) the requests are
10 overbroad. Dkt. No. 64 at 7-8. These claims are without merit.

12 As noted above, L-3 bears the burden of making the showing of
13 good cause contemplated by Rule 26, which requires "a specific
14 demonstration of facts in support of the request as opposed to conclusory
15 or speculative statements about the need for a protective order and the
16 harm which will be suffered without one." *Alexander* 186 F.R.D. at 76
17 (D.D.C. 1998). As previously noted, this burden is a heavy one in
18 employment discrimination lawsuits, where discovery rules are construed
19 liberally so as to provide the plaintiff with "broad access to the employers'
20 records." *Atonio*, 490 U.S. at 643.

1 First, Mr. Kay and Hall are absolutely entitled to know the identity of
2 their fellow applicants --- without the anonymity barriers imposed by
3 defendants. Rule 26(b)(1) obligates litigants to disclose the "**identity** and
4 location of persons who know any discoverable matter." Furthermore, it is
5 without dispute that personnel and comparators information, including
6 identities, are discoverable in USERRA discrimination cases. See *Bobo v.*
7 *UPS*, 665 F.3d 741, 751 (6th Cir. Tenn. 2012) In *Bobo* the Sixth Circuit
8 reversed a lower court's discovery order, holding the order was contrary to
9 law and improperly restricted discovery scope by allowing the company to
10 unilaterally determine who was similarly situated --- same as the
11 circumstances in this case.

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14 In *Wagner v. Novartis Pharms. Corp.*, 2008 U.S. Dist. LEXIS 11089,
15 4-5 (E.D. Tenn. Feb. 14, 2008) the court held that in a § 4311,
16 discrimination case "the proof in this case will necessarily be fact specific
17 to the positions applied for and the qualifications of the various candidates,
18 and selectees, for the positions." Here, Plaintiffs only seek relevant
19 information, *i.e.* the candidate pools and selectees for positions to which
20 they may have applied. Defendants' outright refusal to provide the
21 applicant and pilot information is unjustified.

1 Second, Defendants' fantastic claims of danger to L-3 employees or
2 applicants are overblown and can be easily addressed by this court,
3 without a protective order or denying the Plaintiff access to the relevant
4 records. Fed. R. 5.2 (e)(1) allows this court to direct the "redaction of
5 additional information" that is filed in this case, e.g. the redaction of the
6 names of all third-party applicants or other employees from filings in the
7 public records.
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9 Third, the requests are neither overbroad nor a burden.
10 Defendants have already identified some of the applicants and fellow
11 pilots and provided some of the requested information, but redacted the
12 names of those persons to stall discovery. Dkt. No. 64 at 3.
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14 Defendants' other argument, that Mr. Hall and Kay should "know all
15 the name of the pilots in his program," is also a red herring. Dkt. No 64 at
16 3. Neither Mr. Hall nor Mr. Kay could possibly know who else applied for
17 the jobs they applied to, or with regard Mr. Kay's applications what pilots
18 were hired. On the one hand, Defendants provide some candidate's
19 information, but refuse to provide the rest. Defendants withholding of this
20 discovery is completely unjustified.
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22 Lastly, Defendants' assertions about trade secrets are unsupported
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1 by any factual basis or analysis, and are equally without merit. In *Brown*
2 *Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir. 1992), the
3 Court held that to determine whether a protective order for trade secrets
4 is appropriate, courts must balance conflicting interests.

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6 The party requesting a protective order must make a specific
7 demonstration of facts in support of the request as opposed to
8 conclusory or speculative statements about the need for a
9 protective order and the harm which will be suffered without
one. Such a party must demonstrate that failure to issue the
order will work a clearly defined harm.

10 10A Fed. Proc. Law. Ed. § 26:282 (emphasis added); see also *Beckman*
11 *Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992). In
12 *Beckman*, the Court also stated that “broad allegations of harm,
13 unsubstantiated by specific examples or articulated reasoning, do not
14 satisfy the Rule 26(c) test.” 996 F.2d at 476 (*quoting Cipollone v. Liggett*
15 *Group, Inc.*, 785 F.2d 1108, 1121 (3rd Cir. 1986)).

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18 Here, L-3s’ motion for a protective order is deficient given these
19 guidelines. Specifically, L-3 simply concludes, without analysis, that its
20 employment and hiring policies and employee handbooks should be
21 protected as proprietary trade secrets. Dkt. No. 64 at 8. Defendants fail to
22 allege any harm or prejudice. *Id.* On the other hand, Plaintiffs are entitled
23 to discovery that would show defendants failed to follow their own
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1 practices and policies, and that L-3's explanations for its actions are
2 internally inconsistent or otherwise not believable. See *Kelleher* 302
3 F.R.D. at 598; *Wagner* 565 F. Supp. 2d at 947. The protective order
4 Defendants seek is, thus, not narrowly drawn. "[A] blanket order...is by
5 nature over-inclusive." *Beckman*, 966 F.2d at 476. And must be denied.
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7 **D. Defendants' attorney client privilege and work product**
8 **objections are without merit.**

9 Rule 26(b)(1) obligates litigants to disclose the "identity and location
10 of persons who know any discoverable matter." Plaintiffs' interrogatory
11 No. 5, states, "Please identify any individual(s) that Defendant or its
12 agents have interviewed concerning this case, the events relevant to this
13 case, or Defendant's defenses to Plaintiff's claims." Dkt. 68-1 at 21.
14 Defendants allege this information is attorney-client privileged. But,
15 refuse to list any related information in a privilege log. It is not privileged
16 and the protective order should be denied.
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19 First, the identities of witnesses are discoverable. See *Castle v.*
20 *Sangamo Weston, Inc.*, 744 F.2d 1464, 1467 (11th Cir. 1984); Many
21 courts have found that the identities of even confidential witnesses are
22 discoverable. See *In re Netbank, Inc. Sec. Litig.*, Case No. 07cv2298, 259
23 F.R.D. 656, 2009 U.S. Dist. LEXIS 69031, 2009 WL 2461036 at *17 (N.D.
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1 Ga. Aug. 7, 2009) ("The Federal Rules of Civil Procedure provide that
2 '[p]arties may obtain discovery regarding any non-privileged matter that is
3 relevant to any party's claim or defenses-- including. . .the identity and
4 location of persons who know of any discoverable matter"); *Hoffman v.*
5 *United Telecommunications, Inc.*, 117 F.R.D. 440, 443-44 (D. Kan. 1987).
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7 Numerous other courts have consistently held that the names and
8 addresses of individuals interviewed by counsel "who have knowledge of
9 the facts alleged in the complaint are not protected from disclosure by the
10 work product doctrine." *In re Theragenics Corp. Secs. Litig.*, 205 F.R.D.
11 631, 634-36 (N.D. Ga. 2002) (the names and addresses sought by
12 defense counsel were not protected by the work product doctrine); *In re*
13 *Aetna Inc. Sec. Litig., No. CIV.A.MDL. 1219*, 1999 U.S. Dist. LEXIS 8038,
14 1999 WL 354527, at *3 (E.D. Pa. May 26, 1999) (the identities of people
15 referenced in the complaint are not protected by the work product doctrine
16 as it "will not reveal the mental impressions, conclusions, opinions, or
17 legal theories of [] attorneys"); *United States v. Amerada Hess Corp.*, 619
18 F.2d 980 (3d Cir. 1980) (because the work product content of the list of
19 individuals with knowledge of discoverable information was minimal, the
20 identities were not protected work product); *Am. Floral Servs., Inc. v.*
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1 *Florists' Transworld Delivery Ass'n*, 107 F.R.D. 258, 260-61 (N.D. Ill.
2 1985) (plaintiff had to identify the list of witnesses interviewed).

3 Second, Defendants cite *Laxalt v. McClatchy*, 116 F.R.D. 438 (D.
4 Nev. 1987) for the proposition they may not be forced to disclose the
5 identity of individuals they have interviewed. But, that case is
6 distinguishable and has no bearing here because it dealt with a defendant
7 reporter in a defamation case who refused to disclose confidential
8 sources for news articles, not alleged privilege in this matter. The other
9 case cited by Defendants, *In re MTI Tech. Corp. Secs. Litig. II*, 2002 U.S.
10 Dist. LEXIS 13015 (C.D. Cal. June 13, 2002), is equally off the mark. The
11 plaintiff in *In re MTI Technology* was not required to identify which six
12 individuals were interviewed out the list of names originally provided
13 under Rule 26 because the mental impressions of counsel could be
14 inferred. *Id.* However, the court did not relieve a party from making the
15 required disclosure of the identity of individuals who possessed
16 discoverable material in accordance with Rule 26. Instead, the court
17 specifically stated that the identity of all individuals with knowledge of
18 discovery matter is "not" protected. *Id.*

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23 Third, defendants have failed to show attorney-client privilege could
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1 apply here. To show the applicability of the attorney-client privilege, a
2 claimant must show the following eight essential elements: "(1) Where
3 legal advice of any kind is sought (2) from a professional legal adviser in
4 his capacity as such, (3) the communications relating to that purpose, (4)
5 made in confidence (5) by the client, (6) are at his instance permanently
6 protected (7) from disclosure by himself or by the legal adviser, (8) unless
7 the protection be waived." *A. Farber & Ptnrs., Inc. v. Garber*, 234 F.R.D.
8 186, 192-193 (C.D. Cal. 2006) (citations omitted). Because the attorney-
9 client privilege is in derogation of the search for truth, it is "narrowly and
10 strictly construed." *Id.* "Moreover, "[t]he burden is on the party asserting
11 the privilege to establish all the elements of the privilege[.]" and an
12 assertion of a privilege without evidence to support it will not prevail. *Id.*
13 *See also Saxholm AS v. Dynal, Inc.*, 164 F.R.D. 331, 333 (E.D.N.Y. 1996)
14 (meeting the burden of establishing the applicability of the attorney-client
15 privilege "requires the submission of affidavits or other competent
16 evidence to establish sufficient facts to prove the applicability of the
17 privilege. Conclusory or *ipse dixit* assertions are not enough.").

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22 Defendants' affidavits in regard to attorney-client privilege are
23 woefully inadequate. None of the affidavits address these eight factors.
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1 See Dkt. Nos. 66, 67 at ¶ 16, 68 at 25. Each witness merely parrots the
2 statement of the other that they are not aware of any interviews. Further,
3 Mr. Hineline's declaration only states his conclusions about attorney-client
4 privilege. Dkt. 68 at ¶ 25.

5
6 Similarly, L-3s' declarations fail to establish that the requested
7 materials are work product. A party claiming work product immunity has
8 the burden of proving the applicability of the doctrine. *United States v.*
9 *City of Torrance*, 163 F.R.D. 590, 593 (C.D. Cal. 1995); *see also Gulf*
10 *Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 475
11 (S.D. N.Y. 2003) (holding declaration or affidavit must support work
12 product claim for documents listed solely as work product on privilege
13 log). "Three conditions must be met to earn work product protection. The
14 material must (1) be a document or a tangible thing, (2) that was prepared
15 in anticipation of litigation, and (3) was prepared by or for a party, or by
16 his representative." *Id.* Neither, Mr. Nance, nor Mr. Dangelo address any
17 of these required facts. See Dkt. Nos. 66, 67. Further, Mr. Hineline's
18 declaration only states his conclusions about attorney-client privilege.
19 Dkt. 68 at ¶ 25.

E. Plaintiffs, not Defendants, are entitled to fees.

Fed. R. Civ. P. 37(a)(5) governs the award of expenses to a party against whom a protective order is sought but not obtained. Fed. R. Civ. P. 26(c)(3). A Court must require an unsuccessful movant to pay reasonable expenses incurred in opposing the motion, including attorney's fees, unless the motion was substantially justified. Again, Defendants' motions are not substantially justified. *Supra.* First, Plaintiffs are not the movants in these motions for protective orders. Second, Defendants offer no authority or analysis whatsoever for their position that Mr. Jarrard's alleged conduct (disputed as it is) could ever rise to the level of sanctionable conduct under the civil rules or any other set of rules. Indeed, the Defendants' weaving of parsed, partial, and out-of-context statements, throughout Defendants' briefing, together with their deliberate omission of full communications, is in perfect concert with the exaggerated reactions, overblown characterizations, and uncivil behavior that Mr. Jarrard has vehemently opposed throughout this litigation.

Rather, as the facts show, Plaintiffs' efforts in obtaining discovery in this case have only been stymied by two things: (1) Defendants' counsel's outright refusals to produce records; and (2) refusals to cooperate in

1 resolving discovery matters. Jarrard Decl. ¶¶ 1-30. Finally, the mere fact
2 that Mr. Hine line does not like Mr. Jarrard's direct, or frank communication
3 style, is not a basis for sanctions. In fact, every single email from Mr.
4 Jarrard to opposing counsel states, "Thanks, Have a nice day." *Id.* And
5 despite, Mr. Hine line's yelling, berating, unprofessional and hostile
6 behavior, Mr. Jarrard has abstained from reciprocating such behaviors.
7 Jarrard Decl. at ¶¶ 13-15 and 27-29.

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9 **F. Defendants Motions were waived by serving discovery objections**
10 **first, engaging in the resolution process, and then belatedly filing**
11 **Dkt. Nos. 62, 63, 64, and 81.**

12 A party opposing discovery has only two options: (1) timely
13 objecting to producing the discovery (which L-3 chose in this case), or (2)
14 timely seek a protective order (which L-3 failed to do). See 8A Charles
15 Alan Wright & Arthur R. Miller, Federal Practice and Procedure §2035 (3d
16 ed. 2013); see also *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 413
17 (M.D.N.C. 1991); *Nestle Foods Corp. v. Aetna Cas. and Sur. Co.*, 129
18 F.R.D. 483, 487 (D.N.J. 1990). "Under this line of authority, a motion for a
19 protective order is timely if made prior to the date set for producing
20 discovery." *Lexington Ins. Co. v. Swanson*, 2006 WL 3474185, 2 (W.D.
21 Wash. 2006) *quoting* 6 Moore's Federal Practice at §26.102. "The failure
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1 to timely move for a protective order constitutes grounds for denying the
2 same.” *Brittain*, 136 F.R.D. at 413. As such, a party opposing discovery
3 that chooses to timely file objections, waives the option to proactively
4 move for a protective order. Here, L-3 wants two bites at every apple.
5 Instead of following the procedure, when it does not get the result it wants
6 in discovery resolution, L-3 seeks protective orders. This backwards
7 approach has caused nearly two months delay in getting Defendants’
8 discovery objections to the court, only prejudices Plaintiffs by that delay,
9 and wasted counsel’s time in the meet- and-confer conferences and
10 continues to waste time in discovery. For example, Defendants served
11 answers and objections to Plaintiffs’ discovery while simultaneously while
12 serving another Motion for Protective order (Dkt. No. 81, a literal repeat of
13 its prior motions). *Ibid*.

17 III. CONCLUSION

18 Defendants’ motion should be denied and Plaintiffs should be
19 awarded their fees and costs for responding to these improper motions.
20

21 DATED this August 30, 2016.

22 /s Thomas G. Jarrard

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CERTIFICATE OF SERVICE

I certify that on August 30, 2016, I caused the forgoing and accompanying declaration to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the all counsel of record.

I certify that I have caused to be transmitted via U.S. Mail or email the document to the following non-CM/ECF participant/s: None

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